

1 Thomas R. Beer (148175), tbeer@barwol.com
2 Tino X. Do (221346), tdo@barwol.com
3 BARGER & WOLEN LLP
4 650 California Street, 9th Floor
5 San Francisco, California 94108-2713
6 Telephone: (415) 434-2800
7 Facsimile: (415) 434-2533

8 Attorneys for Defendant
9 GERLING AMERICA INSURANCE COMPANY

10
11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**

13 FIREMAN'S FUND INSURANCE)
14 COMPANY, a foreign corporation a/s/o)
15 BASIC RESOURCES, INC. and GEORGE)
16 REED, INC., a foreign corporation,)

17 Plaintiff,

18 vs.

19 GERLING AMERICA INSURANCE)
20 COMPANY, a foreign corporation,)

21 Defendant.

CASE NO.: 3:07-cv-06302-CRB

22 **DEFENDANT GERLING AMERICA**
23 **INSURANCE COMPANY'S NOTICE OF**
24 **MOTION AND MOTION TO STRIKE**
25 **PLAINTIFF FIREMAN'S FUND**
26 **INSURANCE COMPANY'S REPLY TO**
27 **DEFENDANTS' OPPOSITION TO**
28 **PLAINTIFF'S MOTION FOR SUMMARY**
JUDGMENT, AND OBJECTIONS TO
EVIDENCE SUBMITTED IN SUPPORT
OF PLAINTIFF'S REPLY BRIEF

29
30 TO THE HONORABLE COURT AND TO PLAINTIFF AND ITS COUNSEL OF
31 RECORD:

32 PLEASE TAKE NOTICE that Defendant Gerling America Insurance Company will and
33 hereby does move this Court for an order striking Plaintiff Fireman's Fund Insurance Company's
34 Reply to Gerling's Opposition to Plaintiff's Motion for Summary Judgment and supporting
35 evidence as improper. No hearing is requested for this motion.

36 j:\office2\29218\011\08\pleadings\motion to strike ffc's reply brief.doc

1 This motion is based on the Notice of Motion, the Memorandum of Points and Authorities
2 filed herewith, the pleadings and papers filed herein, the pleadings and records in this case, and such
3 other matters as the Court may deem appropriate.
4

5 Dated: July 25, 2008

BARGER & WOLEN LLP

7 By: /s/ Tino Do
8 THOMAS R. BEER
9 TINO X. DO
10 Attorneys for Defendant GERLING
11 AMERICA INSURANCE COMPANY
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MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION

In response to Defendant Gerling America Insurance Company's ("Gerling") Opposition, Plaintiff Fireman's Fund Insurance Company ("FFIC") now argues that Gerling is precluded from asserting that the "Professional Liability" exclusion in the Gerling policy applies to bar coverage of FFIC's claims because of claims made by Gencor Industries, Inc. ("Gencor") in an appeal of the underlying Florida state court action. This argument was never made, and no evidence concerning the appeal was ever introduced, in either FFIC's Motion for Summary Judgment or in Gerling's Opposition. Accordingly, FFIC's argument in its Reply brief concerning the claims made in Gencor's appellate brief is improper, and the evidence FFIC introduced in support of this argument should be disregarded.

2. ARGUMENT

A. FFIC Improperly Introduces New Facts and Arguments in its Reply Brief

FFIC's Reply brief focuses exclusively¹ on the argument that the "issue preclusion/collateral estoppel"² doctrine prohibits Gerling from alleging that the "Professional Liability" exclusion applies in this coverage action due to an assertion made by Gencor in an appellate brief arising out of the underlying Florida state court action. FFIC never made this argument in its Motion for Summary Judgment and Gerling never had the opportunity to address it in its Opposition brief. Additionally, FFIC failed to introduce any evidence regarding an appeal from the underlying Florida state court action in its Motion for Summary Judgment.

Reply papers are limited to matters raised in the opposition papers. It is improper for the moving party to "shift gears" and introduce new facts or different legal arguments in the Reply brief than presented in the moving papers. *See Lujan v. National Wildlife Federation*, 497 U.S. 871,

¹ FFIC's Reply brief ignores and fails to address the majority of Gerling's arguments in Gerling's Opposition to FFIC's Motion for Summary Judgment, such as FFIC's failure to satisfy its burden of proving that it is entitled to coverage under the Gerling policy, and the preclusion of FFIC's claims due to the applicability of the "Damage to Your Work," "Damage to Your Product" and "Contractual Liability" exclusions to the undisputed facts.

² Although FFIC relies on the collateral estoppel doctrine as the legal basis for its newly crafted Reply argument, FFIC fails to demonstrate where there has been any prior "final judgment" on the issue of whether Calvin Dixon provided "professional services" for coverage purposes.

894-95 (1990) (holding that a court has the discretion to disregard late-filed factual matters); *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) (“district court need not consider arguments raised for the first time in a reply brief”).

Furthermore, FFIC cannot argue that this argument was unforeseen at the time of its Motion for Summary Judgment. The Gencor appellate brief on which FFIC’s new argument is predicated was filed and served on FFIC on December 5, 2007.³ FFIC had possession and full knowledge of this document prior to its filing of its Motion for Summary Judgment on July 3, 2008. Accordingly, FFIC’s argument regarding Gencor’s appellate brief improperly goes beyond the limited scope of a Reply brief and should be stricken.

Gerling objects to the “Third Supplement Declaration of Jon D. Derrevere with Respect to Request for Judicial Notice and in Support of Plaintiff’s Fireman’s Fund Insurance Company Reply to Defendant’s Gerling America Insurance Company Opposition to Plaintiff’s Motion for Summary Judgment and for All Other Purposes.” FFIC should not be allowed to introduce new evidence at this time.

3. CONCLUSION

For the foregoing reasons, Gerling respectfully requests that the Court grant Gerling’s motion to strike FFIC’s Reply brief and supporting evidence as improper.

Dated: July 25, 2008

BARGER & WOLEN LLP

By: /s/ Tino X. Do
 THOMAS R. BEER
 TINO X. DO
 Attorneys for Defendant GERLING
 AMERICA INSURANCE COMPANY

³ FFIC notes in its Reply brief that the oral argument in the appeal was July 23, 2008. However, the date of the oral argument has no relevance given that the Gencor appellate brief at issue was served upon FFIC on December 5, 2007.